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attorneys' fees were not included. It may be questioned whether the court might not have placed its decision upon the still narrower ground that the tender was ineffective,¹³ having been made after the commencement of the suit.

E. J. S.

OMISSION IN PLEADING: DEFECT CURED BY THE ADMISSION OF EVIDENCE.—*Slaughter v. Goldberg, Bowen & Co.*¹ was an action for the death of plaintiff's son, alleged to have been caused by the negligence of defendants. The complaint contained no allegation whatever of the existence of heirs; but after the overruling of a general demurrer, plaintiff testified without objection to the fact that the decedent was her son, and to other facts showing that she was damaged by his death. The omitted allegation has been held to be essential to the statement of a cause of action of this character;² and after judgment for the plaintiff, the defendant on appeal urged that the defect was not cured by the admission of the evidence in question. However, technical objections like this seem to be going out of fashion, for, relying on that oft slighted section 475 of the Code of Civil Procedure, the court disposed of the contention by asking the question: "How can it be said that the defendant has sustained substantial injury and that a different result would have been probable if such error . . . or defect . . . had not occurred?"

The decision in this case indicates a new and more liberal attitude towards the consideration, on appeal, of defects in pleading. The previous decisions had allowed the appellant to prevail upon showing any substantial defect in his opponent's pleading, whatever the condition of the evidence,³ unless the defect had been cured by the fact that the appellant's own pleading supplied the omitted allegation.⁴ Under these decisions, had the principal case been appealed upon the judgment roll alone, a reversal might have resulted.⁵ And if a general demurrer had been sustained, and the

¹³ At common law a tender cannot be made after suit is begun. *Levan v. Sternfeld* (1892), 55 N. J. L. 41, 25 Atl. 854; *Murray v. Windley* (1847), 29 N. C. (7 Ired. Law) 201, 47 Am. Dec. 324. This rule has not been changed by the code unless such a tender can be considered as a "due offer" or "duly made" under § 1500 or § 1504 Cal. Civ. Code. § 997 Cal. Code Civ. Proc. provides only for a written offer of compromise after suit.

¹ (Jan. 14, 1914), 20 Cal. App. Dec. 89, rehearing denied by the Supreme Court March 15, 1915.

² *Webster v. Norwegian Mining Co.* (1902), 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Jones v. Leonardt* (1909), 10 Cal. App. 284, 101 Pac. 811.

³ *Richards v. Travelers' Ins. Co.* (1889), 80 Cal. 505, 22 Pac. 939; *Ruiz v. Santa Barbara Gas Co.* (1912), 164 Cal. 188, 128 Pac. 330. See also comment 3 Cal. Law Rev. 163.

⁴ *Abner Doble Co. v. Keystone etc. Mining Co.* (1904), 145 Cal. 490, 78 Pac. 1050.

⁵ *Buckman v. Hatch* (1903), 139 Cal. 53, 55, 72 Pac. 445; *Richards v. Travelers' Ins. Co.* supra, note 3.

plaintiff had declined to amend, a judgment entered upon the sustaining of the demurrer would doubtless have been affirmed.⁶ However, in the present case, the appellate court had before it the evidence given at the trial, from which it appeared that the error in overruling the demurrer had not worked any prejudice.

That the court was correct in its decision, and that it did not err in citing the newly amended section four and one half of article six of the California Constitution⁷ in support of its conclusion, is apparent. In a recent decision⁸ the Supreme Court has held that this section applies not only to cases appealed after its passage but also to pending appeals, and it has also denied a rehearing in the principal case.⁹

G. H. G.

PARENT AND CHILD: SUPPORT OF CHILD: LIABILITY OF FATHER.—In the case of *Rogers v. Rogers*¹ the husband abandoned his wife and four small children under the age of nine years on April 18, 1908. On May 17, 1912, the wife secured a divorce with alimony. Later she began suit for the cost of maintenance of the children during the time from abandonment until the date of the divorce decree. The principal defence was that the divorce had been granted to the wife with the custody of the children, and that the decree said nothing concerning the support of the children during the period before the divorce. The court sustained the wife's right to recover for support of the children from the date of the husband's abandonment to the date of the divorce, saying, "During the time referred to the father was not released from the duty of caring for his children, nor precluded from having a voice in determining what expenses should be incurred. The wife had not voluntarily assumed the sole responsibility for their support. That was forced upon her by his misconduct.

The liability of parents to support their children rests upon an entirely different foundation from that upon which the law bases the duty of the husband to care for his wife. The obligation is at once moral and legal, and does not depend upon the marriage, but upon the fact of parentage.² Hence, the dissolution of the marriage does not dissolve the obligation to support; and it is not the policy of the law to deprive children of their rights on account

⁶ *Brown v. Orr* (1865), 29 Cal. 120; *Burke v. Maguire* (1908), 154 Cal. 456, 98 Pac. 21.

⁷ Senate Const. Amend. 12, Amendments and Proposed Statutes, Nov., 1914, p. 3.

⁸ *Vallejo & Northern R. R. Co. v. Reed Orchard Co. et als.* (March 5, 1915), 49 Cal. Dec. 340.

⁹ (March 15, 1915).

¹ (Kans., Oct. 10, 1914), 143 Pac. 410.

² *State v. Seghers* (1909), 124 La. 115, 49 So. 998; *Rounds Bros. v. McDaniel* (1909), 133 Ky. 669, 118 S. W. 956.